

1           IN THE UNITED STATES DISTRICT COURT  
2           FOR THE EASTERN DISTRICT OF VIRGINIA  
2           RICHMOND DIVISION

3           -----:-----  
4    UNITED STATES OF AMERICA           :  
5   :  
5    v.                                   :  
6   Criminal No.  
6   3:08CR00132-01  
7    EDWARD HUGH OKUN                   :  
7   March 11, 2009  
8           -----:  
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10           EXCERPT TRANSCRIPT OF TRIAL TESTIMONY OF **ERIC MASSELL**  
11           BEFORE THE HONORABLE ROBERT E. PAYNE  
11           UNITED STATES DISTRICT JUDGE  
12

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15   APPEARANCES:

16   MICHAEL DRY, Assistant United States Attorney  
16   BRIGHAM CANNON, Assistant United States Attorney  
17   JESSICA A. BRUMBERG, Assistant United States Attorney  
17   Richmond, Virginia

18           Counsel on behalf of the United States  
19

20   CAROLYN V. GRADY, Assistant Federal Public Defender  
20   ROBERT J. WAGNER, Assistant Federal Public Defender  
20   Richmond, Virginia

21   and

22   MILLER & CHEVALIER  
22   Washington, D.C. 20005  
22   BY: BARRY J. POLLACK, ESQ.

23           Counsel on behalf of the Defendant.  
24

25           DIANE J. DAFFRON, RPR  
25           OFFICIAL COURT REPORTER  
25           UNITED STATES DISTRICT COURT

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DIRECT CROSS REDIRECT RECROSS

6 ERIC MASSELL

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E X H I B I T S

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10 **GOVERNMENT'S EXHIBITS:**

11 No. 269A Line of credit summary 10  
12 No. 269B Year-end statement for 2006 18

13

14 **DEFENDANT'S EXHIBITS:**

15 No. 25 Status report 29  
16 No. 26 1/26/07 e-mail 33  
17 No. 27 Status report dated 1/3/07 33  
18 No. 28 3/2/02 e-mail 34  
19 No. 29 e-mail to McCabe 36  
20 No. 30 P&L statement for 2006 37  
21 No. 31 Status report dated 3/9/07 39  
22 No. 32 3/24/07 e-mail 45

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1 \* \* \* \*

2 MR. DRY: The United States would call Eric  
3 Massell.

4

5 ERIC MASSELL, called by the United States, first  
6 being duly sworn, testified as follows:

7

8 DIRECT EXAMINATION

9 BY MR. DRY:

10 Q Mr. Massell, please state your full name for the  
11 record.

12 A It's Eric Michael Massell.

13 Q Please spell your last name.

14 A M-a-s-s-e-l-l.

15 Q I'm sorry. Your first name is spelled how?

16 A Eric, E-r-i-c.

17 Q Sir, briefly state your educational background.

18 A I graduated from James Madison University summa  
19 cum laude with a degree in accounting in 2005.

20 Q Do you hold any professional certifications?

21 A Yes, I'm currently a licensed CPA in Virginia.

22 Q Where are you currently employed at, sir?

23 A I am currently employed at a firm formerly known as  
24 PENTA Advisory Services. It's now known as Protivity.

25 Q What type of work does PENTA and now Protivity do?

1 A We do bankruptcy and restructuring work as well as  
2 litigation and forensic accounting.

3 Q So is that accounting work for companies that  
4 might be in bankruptcy or distressed companies, things  
5 like that?

6 A That's correct.

7 Q Was PENTA/Protivity your employer in the fall of  
8 2007?

9 A Yes, it was.

10 Q During that time frame, during December of 2006,  
11 did you come to be -- did you work on the 1031 Tax  
12 Group PENTA engagement?

13 A Yes, I did.

14 Q How did that come about?

15 A We have a probably monthly staffing meeting, and  
16 we went through the clients that we currently had, and  
17 it was determined that based on my history and my  
18 availability that I would be best suited for this case.

19 Q What was your understanding of what PENTA had been  
20 engaged or hired to do?

21 A My understanding was we were to quantify the cash  
22 or the main objectives of my work were to quantify how  
23 much cash the 1031 Tax Group had as of year-end 2006,  
24 quantify the liability that they owed to their  
25 exchangers, and then determine where that whole of

1 money went.

2 Q Did you personally -- were you personally  
3 responsible for determining the amount of money that  
4 had left -- the client exchange funds that had left  
5 1031 Tax Group and gone for non-exchange related  
6 purposes?

7 A Yes, I compiled that analysis with the help of  
8 associates.

9 Q How did you go about compiling that analysis?

10 A We started with site visits to all of the  
11 qualified intermediaries. We went to IXG in Denver,  
12 SOS in Trumbull, AEC in Boston, REES in Safety Harbor,  
13 and we went to those qualified intermediaries and  
14 determined the availability of their bank records and  
15 their accounting records.

16 We asked for copies of all their accounting  
17 records and bank records. And depending on the quality  
18 of the accounting records, sometimes we relied on their  
19 accounting records. We then put together with the bank  
20 statements a database that included upwards of 10,000  
21 lines, which was entered in by temps that we hired to  
22 build the database. That work was vetted by myself and  
23 an associate.

24 Then we spent three months tracing those  
25 transactions, every single transaction, where the funds

1 ultimately went.

2 Q You said "the database," what were the source  
3 documents for the information in the database? In  
4 other words, what did the database rely on?

5 A The database relied on the bank statements. When  
6 we performed the tracing of where the funds came from  
7 or went to, we used a number of accounting records and  
8 various sources.

9 Q Okay. Now, who actually inputted the information  
10 into the database from the bank statements?

11 A We hired two temps, as well as I believe I did  
12 some just to doublecheck the temps' work and another  
13 associate.

14 Q You said tracing the money with the use of bank  
15 statements. Just so I understand, you would look for  
16 the money leaving a qualified intermediary bank account  
17 and going into Investment Properties of America; is  
18 that correct?

19 A That was one of the many types of transactions  
20 that we traced.

21 Q If it went into the Investment Properties of  
22 America account, did you trace it after that?

23 A No, we did not.

24 Q Okay. What was the purpose of this tracing? What  
25 were you trying to get to?

1 A We were ultimately -- we determined an amount of  
2 liability using accounting records and sometimes client  
3 exchange files, and we determined the amount of cash,  
4 and there was a shortfall of cash to satisfy that  
5 liability.

6 MR. WAGNER: Objection. Is he drawing a  
7 conclusion now? I'm not quite sure. He said "a  
8 shortage of cash." It's unresponsive to the question.

9 MR. DRY: Let's do it this way.

10 BY MR. DRY:

11 Q First, what time period were you personally  
12 reviewing bank statements for cash?

13 A For the calendar year of 2006.

14 Q So from January 1<sup>st</sup> of 2006 to year-end 2006,  
15 that was when you were first personally tracing; is  
16 that correct?

17 A That's correct.

18 Q I'm going to show you what's previously been  
19 marked as Government's Exhibit 269A. It's not been  
20 introduced into evidence.

21 MR. DRY: Mr. Neal?

22 THE COURT: I think we need a screen or  
23 something.

24 Q Sir, do you recognize this document?

25 A I do.

1 Q What does this document represent?

2 A This document represents an analysis prepared for  
3 David Field in April of 2007.

4 Q And you have had a chance to review Government's  
5 Exhibit 269A before your testimony today, sir?

6 A Yes, I have.

7 Q Are there additional schedules behind Government's  
8 Exhibit 269A?

9 A Yes, there are.

10 Q And that's the supporting schedules for these  
11 aggregate numbers; is that correct?

12 A That is correct.

13 MR. DRY: At this time I'd like to move  
14 Government's Exhibit 269A into evidence.

15 THE COURT: Any objection?

16 MR. WAGNER: I would object, Your Honor. I  
17 believe that the information that's provided in  
18 Government's Exhibit 269A relied on expert opinion,  
19 expert services. Mr. Massell has indicated he relied  
20 on accounting records in order to come up with his  
21 determination with the figures and facts. He used  
22 accounting sources, he indicated. He did not simply  
23 rely on bank records to come up with these  
24 determinations.

25 It sounds like he used his own accounting

1 experience and expertise in order to come up with these  
2 figures. So for these reasons and reasons we've stated  
3 previously we'd object to the admission of this  
4 exhibit.

5 MR. DRY: Your Honor, the government's  
6 position is that we have laid the foundation that he's  
7 relied on the bank statements for the creation of the  
8 database. This document which Mr. Massell produced as  
9 he was employed at PENTA, who had been hired by the law  
10 firm that Mr. Okun had engaged, this is basically a  
11 business record that was provided on behalf of the  
12 company. It's not expert testimony whatsoever, Your  
13 Honor. It's just tracing exactly what Mr. Zacarias had  
14 testified to regarding the 2005 transactions.

15 MR. WAGNER: Your Honor, he was engaged as an  
16 expert by the client or by KPKB. And he also testified  
17 that other people inputted this information into the  
18 database, relied on the database.

19 THE COURT: That doesn't make it expert.

20 MR. WAGNER: It doesn't make it expert, but  
21 --

22 THE COURT: It doesn't have anything to do  
23 with it, does it?

24 MR. WAGNER: The point I'm trying to make --

25 THE COURT: The issue is whether he's

1 testifying as to facts or giving of expert analysis of  
2 some sort. Is that what it's about?

3 MR. WAGNER: That is our objection.

4 THE COURT: All right. Objection overruled.

5 He can testify as to the facts.

6 MR. DRY: At this time Government's Exhibit  
7 269A, please.

8 (Government's Exhibit 269A is admitted into  
9 evidence.)

10 BY MR. DRY:

11 Q Sir, can you describe Government's Exhibit 269A  
12 for the members of the jury what this reflects? And  
13 concentrate on the 2006 time frame, sir.

14 A Okay. This analysis shows that of all the bank  
15 activity in 2006, \$35.5 million of those funds were  
16 sent from the qualified intermediaries into the IPoFA  
17 operating account 2719. \$20.3 million was sent to  
18 other related entities of IPoFA.

19 Mr. Okun contributed \$9.3 million in 2006.

20 THE COURT: What do you mean "contributed"?

21 THE WITNESS: Well, net. \$9.3 million was  
22 returned to the qualified intermediaries from  
23 Mr. Okun's personal accounts.

24 Q And the last column, sir?

25 A \$12.3 million of qualified intermediaries funds

1 was used to purchase other qualified intermediaries.

2 Q Okay, sir. You testified that the \$9.35 million  
3 was returned from Mr. Okun's account to qualified  
4 intermediaries, correct?

5 A That's correct.

6 Q Did you have Mr. Okun's personal bank statements?

7 A We had two of his personal bank statements.

8 Q And you had the bank statements for the qualified  
9 intermediaries?

10 A That's correct.

11 Q Now, you previously testified that money that left  
12 the qualified intermediaries and went into IPofA's bank  
13 accounts, and I think you're referring to 2719,  
14 correct?

15 A Yes.

16 Q That after it went into that account, you wouldn't  
17 see where it went past that account, correct?

18 A That's correct. Once we determined that the funds  
19 had left the qualified intermediary, we did not trace  
20 them further.

21 Q So would this --

22 THE COURT: I thought you said that you  
23 traced them into IPofA.

24 THE WITNESS: To clarify, we traced them into  
25 the IPofA 2917 operating account. We would not have

1 traced where the funds went from the 2719 operating  
2 account.

3 Q So if money had left 2719, IPofA's operating  
4 account, and went to Mr. Okun personally, that would  
5 not have been captured in this document, correct?

6 A That's correct.

7 Q Now, sir, the loan balance as of 12-31-05, that  
8 information was provided by Mr. Zacarias?

9 A That's correct.

10 Q Then can you read for members of the jury the  
11 total amount of the loan balance as of December 31,  
12 2006?

13 A \$114,306,478.00.

14 Q Was there a materiality threshold that was  
15 included in your analysis?

16 A Yes, there was.

17 Q What is the materiality threshold?

18 A A materiality threshold was an amount set to best  
19 use of -- to budget our time so we did not waste time  
20 searching for transactions that would have small  
21 impacts to the final analysis.

22 Q What was that threshold set at, if you remember?

23 A We set that threshold at, I believe, \$5,000.

24 Q So is it fair to say any transaction that was  
25 below \$5,000 would not be reflected on your analysis?

1 A That's incorrect.

2 Q I'm sorry?

3 A That's incorrect.

4 Q Okay. Please explain.

5 A We set the materiality threshold at \$5,000;  
6 however, if information was readily available for us to  
7 trace that \$5,000, we would have included it in our  
8 analysis. It was only if we needed to spend a  
9 substantial amount of time researching a transaction  
10 under \$5,000.

11 Q So if it was above \$5,000 you would spend the time  
12 it took?

13 A That's correct.

14 Q How confident are you regarding -- well, first of  
15 all, this analysis was current as of what date?

16 A I believe April of 2007, mid April.

17 Q Okay. Is this a conservative figure? First of  
18 all, were there unresolved transactions?

19 A Yes, there were.

20 Q Describe to the members of the jury what an  
21 unresolved transaction would be.

22 A An unresolved transaction would be -- an example  
23 would be a debit out of a bank account that we could  
24 not trace where the funds were ultimately going. It  
25 might have been going to a title company, but we were

1 not sure the funds were used to purchase a property for  
2 Investment Properties of America or if they were for a  
3 client exchange.

4 Q For those unresolved transactions, were those  
5 included in your number?

6 A No, there were not.

7 Q So if there was something that you couldn't  
8 determine, just to be clear, that would not be  
9 reflected -- the number -- and you later resolved it,  
10 would the number have gone down or up?

11 A The number most likely would have gone up.

12 Q The number we're talking about is the \$114  
13 million?

14 A That's correct.

15 MR. WAGNER: Objection to the opinion, Your  
16 Honor. Move to strike.

17 THE COURT: What opinion did he give?

18 MR. WAGNER: That it was likely to go up.

19 MR. DRY: Your Honor, all he's simply -- the  
20 witness is testifying to a fact that they did not  
21 include transactions in this number that they weren't  
22 absolutely sure should have been there. That had they  
23 been resolved later, the number would have gone up  
24 rather than down.

25 THE COURT: He said likely.

1 MR. DRY: Likely would have gone up, not  
2 down.

3 THE COURT: I understand that, but why isn't  
4 that an opinion? I heard the testimony. Got it. So  
5 why isn't it an opinion? Likely would have gone up.

6 MR. DRY: Because --

7 THE COURT: It is, isn't it?

8 MR. DRY: I don't believe so, Your Honor,  
9 because all he's saying is that he did not include  
10 unresolved transactions in that, and all he's  
11 explaining to the jury is what that means.

12 THE COURT: Why isn't that his opinion  
13 instead of facts?

14 Objection sustained. Just disregard what  
15 would have happened one way or the other, up or down.

16 BY MR. DRY:

17 Q What percentage of the transactions -- strike  
18 that.

19 Were you able to obtain all of the bank  
20 statements?

21 A No, we were not.

22 Q Which bank statements did you attempt to get?

23 A I don't know.

24 Q Did you get the bank statements for the qualified  
25 intermediaries?

1 A We received all of the main operating accounts for  
2 each qualified intermediary as well as every individual  
3 money market account or segregated funds we could  
4 obtain. Certain qualified intermediaries we had to  
5 make second trips to copy all their documents, to  
6 obtain all bank statements.

7 Q What did you do to find additional bank  
8 statements?

9 A Well, an example would be if there was an  
10 unreconciled transaction, we would -- a lot of times  
11 the bank statements would note that they were going to  
12 another Citibank account, and we would try to track the  
13 corresponding credit and find that in another bank  
14 account.

15 We also created a matrix of all the accounts that  
16 we had making sure that we had all the months necessary  
17 to complete the analysis.

18 Q Turning to Government's Exhibit 269B, please,  
19 which has not been admitted into evidence. Did you  
20 prepare this document, sir?

21 A I believe I did.

22 Q What is reflected on this document?

23 A This document shows the client liability as of  
24 year-end 2006, has the cash as of 2006 year-end, and  
25 shows a deficit, and fills that deficit with the \$114

1 million that we previously discussed leaving  
2 unreconciled transaction of --

3 MR. WAGNER: Objection to reading from the  
4 exhibit, Your Honor. It hasn't been introduced.

5 MR. DRY: At this time the United States --  
6 well, at this time the United States would seek to  
7 admit Government's Exhibit 269B.

8 MR. WAGNER: Your Honor, it appears to be  
9 incomplete. There's no supporting documentation for  
10 it. It appears to be one page of a longer report.

11 THE COURT: That's your objection is that  
12 it's incomplete? Is that it?

13 MR. WAGNER: And improper foundation for the  
14 findings here because these are numbers without any  
15 foundation for them.

16 THE COURT: That's just another way of  
17 stating that it's incomplete; is that right?

18 MR. WAGNER: That's correct, Your Honor.

19 THE COURT: All right.

20 Is it incomplete or not, Mr. Dry?

21 MR. DRY: Your Honor, I'm not sure.

22 THE COURT: So why don't you ask him?

23 BY MR. DRY:

24 Q Is this document complete, sir?

25 A When I was provided with the documents, it did

1 have the underlying exhibits, I believe.

2 THE COURT: "Underlying exhibits?" What were  
3 they?

4 THE WITNESS: I believe that there was -- I'm  
5 sorry. The underlying exhibit was only for the insider  
6 loan number.

7 Q And that was the document we just referred to?

8 A That's correct.

9 THE COURT: So there were no exhibits to 269B  
10 or there were? There were no attachments or exhibits  
11 to that?

12 THE WITNESS: I don't believe so.

13 THE COURT: All right. Objection overruled.

14 There weren't any.

15 (Government's Exhibit No. 269B is admitted  
16 into evidence.)

17 BY MR. DRY:

18 Q Sir, going to the bottom of that page, sir -- I'm  
19 sorry. Just blow up the entire thing.

20 THE COURT: 269B?

21 MR. DRY: Yes, sir.

22 BY MR. DRY:

23 Q Sir, how current is this document in your  
24 analysis?

25 A This is as of our meeting with Mr. Field in

1 April 23 of 2007.

2 Q So the date on this document, it should be 2007  
3 rather than 2006?

4 A Correct.

5 THE COURT: Which date? There are a lot of  
6 dates on it.

7 MR. DRY: I believe, Your Honor, at the  
8 bottom of the screen. At the very bottom of the page.

9 Q Can you read that line?

10 A The hyperlink?

11 Q Yes.

12 A "T:/1.cases/THE 1031 Tax Group/Status  
13 Reports/4-23-2006 Meeting with D Field." I believe that  
14 should be 2007.

15 Q Okay.

16 THE COURT: There's also a date of 2006 up at  
17 the top on two columns. One is December 31, 2006 and  
18 the other is April 30, 2006.

19 Q Is either one of those dates incorrect, sir?

20 A Yes. The April 30, 2006, should be April 30,  
21 2007.

22 Q Okay, sir. In fact, had you been -- your original  
23 engagement, had you been asked to do any work on 2007  
24 financial transactions?

25 A No, we had not.

1 Q The date on 12/31/06, is that analysis as of  
2 April 23rd of 2007, is that your analysis of the client  
3 liability and cash and amount of insider loans that we  
4 talked about earlier?

5 A As of 2006? I'm sorry. Could you restate it?

6 Q It was a confusing question. I apologize.

7 You gave this information to Mr. Field on April 23  
8 of 2007?

9 A Correct.

10 Q As of that date, these numbers reflected the  
11 year-end numbers for 2006, correct?

12 A Correct.

13 Q Okay. And --

14 MR. DRY: One moment, Your Honor.

15 Q Sir, the insider loans figure, that's the figure  
16 we talked about earlier, the \$114 million?

17 A Correct.

18 Q And the unreconciled transactions, is that what we  
19 were talking about earlier, the \$5 million?

20 A Correct.

21 MR. DRY: No further questions.

22 THE COURT: Mr. Wagner?

23

24 CROSS-EXAMINATION

25 BY MR. WAGNER:

1 Q Good afternoon, Mr. Massell.

2 When did your engagement first begin with PENTA  
3 and KPKB on this project?

4 A In December of 2006.

5 Q When did it end?

6 A Late April 2007.

7 Q So after April of 2007 your firm no longer had  
8 responsibilities in terms of the findings and results  
9 that were requested under this engagement, correct?

10 A I believe we were not paid for our services, so we  
11 did not work on the engagement any longer.

12 Q You met with the government agents in this case a  
13 number of times; is that right?

14 A That's correct.

15 Q The first time was in July of 2007; is that right?

16 A I don't recall the date, but I remember the  
17 meeting with the government.

18 Q Do you remember the first time you met with the  
19 government, though, regarding this case and your  
20 findings here?

21 A Correct.

22 Q And isn't it true that you appeared at that  
23 meeting with a senior accounting associate of yours,  
24 Ms. Roski?

25 A That is correct.

1 Q And then you met again with the agents on the 19th  
2 of May of 2008. Do you remember a May 2008 meeting  
3 with the agents?

4 A I don't recall the date, but I remember another  
5 meeting.

6 Q Again, you were present with Ms. Roski at that  
7 interview; is that right?

8 A Correct.

9 Q Do you recall, specifically?

10 A The first meeting I was interviewed separately  
11 from Ms. Roski.

12 Q The first meeting you were separate from  
13 Ms. Roski?

14 A I believe so.

15 Q Let me show you very briefly a memorandum of  
16 interview from the -- I'm sorry.

17 THE COURT: Are you drawing the distinction  
18 between whether you came for the interview with  
19 Ms. Roski but each of you were interviewed separately?

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: All right. Let's make sure you  
22 know what you're doing.

23 BY MR. WAGNER:

24 Q This is May of 2008, you were there with  
25 Ms. Roski, correct?

1                   THE COURT: Are you asking whether he was  
2 interviewed separately or --

3 Q           Interviewed at the same time by government agents  
4 with Ms. Roski?

5 A           Was that the first meeting?

6                   THE COURT: Second.

7 Q           Second.

8 A           The second meeting I was interviewed with  
9 Ms. Roski.

10 Q           And then the last time you met was January of this  
11 year with the agents; is that correct?

12 A           That's correct.

13 Q           And that was by yourself?

14 A           Correct.

15 Q           At the time of the engagement, you were a junior  
16 member of the accounting staff; is that right?

17 A           Yes.

18 Q           Ms. Roski was the senior member on the project; is  
19 that correct?

20 A           That's correct.

21 Q           And you had less than two years of experience in  
22 accounting out of undergraduate school?

23 A           That's correct.

24 Q           And at the time you first started the engagement,  
25 you had not yet gotten your CPA; is that right?

1 A I had completed the four sections of my exam, but  
2 had not completed the paperwork.

3 Q Would you characterize the results of your  
4 findings here as reliable?

5 A Yes.

6 Q Now, when you first took on the task, would it be  
7 accurate to say it was complex?

8 A That would be an understatement.

9 Q You had a very high volume of transactions that  
10 you were dealing with; is that right?

11 A That is correct.

12 Q And you did not conduct a formal audit; is that  
13 right?

14 A That is correct.

15 Q Or review the financials; is that right?

16 A I do not believe there were financials to review.

17 Q You relied on three temporary employees for a lot  
18 of the information that you compiled in this  
19 engagement; is that right?

20 A That's correct with the caveat that bank  
21 statements have a check in them, and all the bank  
22 statements were checked at the end of each month.

23 Q But you don't know if you had all the bank  
24 statements; is that right?

25 A We believed we collected about 98 percent of the

1 bank statements?

2 Q You believe you collected about 98 percent; is  
3 that right?

4 A That's correct.

5 Q Did you speak with a Mr. Todd Pajonas in compiling  
6 the bank statements in this case?

7 A I believe he had left prior to the engagement.

8 Q So you never questioned him about any bank  
9 statements that he may or may not have turned over to  
10 SOS; is that correct?

11 A That's correct.

12 Q Did you speak to Ms. Dashiell about any bank  
13 accounts that she might have put away from the 1031  
14 Advance?

15 A I believe 1031 Advance was purchased at the end of  
16 2006, and we only traced the funds coming in from the  
17 1031 Advance Group.

18 Q For IXG, did you speak with Mr. McCabe or  
19 Mrs. McCabe about any accounts that might have been  
20 kept away from the folks at IPoFA in Richmond?

21 A We did.

22 Q Were you made aware that there were any accounts  
23 that they had kept separate that they did not disclose  
24 to the folks in Richmond?

25 A I became aware of that in 2007.

1 Q You located some bank accounts that the 1031 Tax  
2 Group was not aware of; is that right?

3 A That's correct.

4 Q Now, you were looking at each of the QIs  
5 separately; is that right?

6 A That's correct.

7 Q And did you find many dealings with intercompany  
8 transfers of funds, for instance, funds from one QI to  
9 another?

10 A Yes, we did.

11 Q And were you able to track all of those  
12 intercompany transfers?

13 A The vast majority, yes.

14 Q What percentage would you say?

15 A About 98 percent.

16 Q Each QI had problems with their accounting  
17 records; isn't that right?

18 A Some QIs did.

19 Q With the exception of maybe IXG?

20 A Yes.

21 Q All the others had very serious accounting  
22 problems; isn't that right?

23 A I don't believe NES in San Antonio did.

24 Q You did not do a cash analysis through your  
25 engagement; is that right?

1 A What is a cash analysis?

2 Q Did you do a cash analysis?

3 THE COURT: He's asking you what you asked.

4 A What is a cash analysis?

5 Q What is a cash analysis?

6 A Yes.

7 Q That you track all of the cash going from one  
8 company to another into one company and out of the  
9 company.

10 A Yes, we did perform a tracking analysis.

11 Q Now, in your findings, Exhibit 269A, you came up  
12 with a loan balance as of December 31 of 2005, and that  
13 came from Mr. Zacarias; isn't that right?

14 A Correct. That was put together by Mr. Zacarias.

15 Q And you can't say whether his numbers were  
16 reliable; is that right?

17 A That is correct.

18 Q And you did nothing to validate Mr. Zacarias's  
19 work; is that right?

20 A We did not.

21 Q And you simply assumed that the opening balances  
22 were correct as your starting point for your 2006  
23 analysis; is that right?

24 A Yes, we explained that to management.

25 Q And you started your 2006 analysis when Mr.

1   Zacarias resigned from IPoFA, is that right, or a  
2   little after?

3   A     A little after, yes.

4   Q     Isn't it true you relied on statements from QI  
5   employees and 1031 employees, statements they made  
6   about the accounts?

7   A     Yes, we did.

8   Q     And you didn't do all the work yourself? You had  
9   other people helping you to prepare these financials;  
10   is that right?

11   A    That's correct.

12   Q    Isn't it also true that you prepared a series of  
13   regular status reports of the findings that you made or  
14   status reports were prepared by the team, I should say?

15   A    That's correct.

16   Q    And there were notes from the team meetings that  
17   were prepared; is that right?

18   A    Correct.

19   Q    Now, you were privy to all of the status reports  
20   that were prepared; is that right? Copies were sent to  
21   you?

22   A    Yes.

23   Q    And a lot of them were based on the analysis that  
24   you had performed; is that correct?

25   A    That's correct.

1 Q I'd like to address your attention to Defense  
2 Exhibit -- I believe we're on 24.

3 MS. BISHOP: 25.

4 Q 25. We're going to go to PENTA team status report  
5 dated January 24 of 2007. I hand you a copy of this.  
6 Do you see it on the screen?

7 A Yes.

8 Q I do want to give you a copy. You are familiar  
9 with this report?

10 A Kind of.

11 Q And this was prepared by the PENTA team?

12 A That's correct.

13 MR. WAGNER: I would offer this into evidence  
14 as Defendant's Exhibit No. 24.

15 MR. DRY: No objection from the government.

16 MR. WAGNER: 25, I apologize.

17 THE COURT: It's 25.

18 (Defendant's Exhibit No. 25 is admitted into  
19 evidence.)

20 BY MR. WAGNER:

21 Q I would ask that you go to the fourth paragraph  
22 down. "As per discussion with representatives of the  
23 company," could you please read that?

24 A "As per discussion with representatives of the  
25 company, we understand that Jeff Zacarias, a former

1 IPoFA employee, and Jorge Guerra, an accounting  
2 consultant, reviewed 2005 intercompany transactions.  
3 Through their procedures, Messrs. Zacarias and Guerra  
4 determined opening beginning loan balances between  
5 IPoFA, Mr. Okun, AEC, and SOS."

6 Q Now, then I want you to go two paragraphs down and  
7 read that paragraph starting with "PENTA has  
8 requested."

9 A "PENTA has requested but not yet received up to 80  
10 monthly bank statements required to complete the  
11 above-described analysis. All of January 25, 2007, the  
12 company expected to receive a substantial number of  
13 statements in the next two business days."

14 Q Do you know whether or not you received those  
15 statements?

16 A I believe we received the majority of them.

17 Q But not all of them?

18 A Correct.

19 Q I want to turn your attention to an e-mail, which  
20 we'll mark as Defense Exhibit 25.

21 MS. BISHOP: 26.

22 THE COURT: Mr. Wagner, that was an example  
23 of something we just wasted time. He already testified  
24 about both of those topics that were there. We spent  
25 the time going through those exhibits when he had

1 already testified to those things. So why don't you  
2 just focus on -- once you get an answer, go on and do  
3 something else.

4 MR. POLLACK: I will.

5 THE COURT: Not everything has to be in  
6 paper.

7 MR. WAGNER: Very well.

8 Q Let me show you an e-mail dated January 26, 2007.  
9 Do you recognize that e-mail? There's an attachment to  
10 it. There's a second page.

11 A Yes, I do.

12 Q And this is an e-mail indicating to Mr. Shefman --  
13 who is Mr. Shefman?

14 A Mr. Shefman was a previous owner of REES in Safety  
15 Harbor.

16 Q Indicating to him your inability to trace certain  
17 bank statements; is that right?

18 A That's correct.

19 MR. WAGNER: I would move this into evidence  
20 as Defense Exhibit 26, Your Honor.

21 MR. DRY: Objection, Your Honor. Hearsay.

22 MR. WAGNER: This is an e-mail from him to  
23 Mr. Shefman.

24 THE COURT: Why don't we call it hearsay,  
25 which is what it is?

1                   MR. WAGNER: It's his statement, Judge. It's  
2 his e-mail. But what he's doing is he's communicating  
3 information to Mr. Shefman about information he needs,  
4 about accounts that he needs information --

5                   THE COURT: Why does that change it from  
6 hearsay?

7                   MR. WAGNER: It's not being offered to prove  
8 the truth of the matter asserted, it's being offered to  
9 show that he didn't have certain things, that he needed  
10 these things to be provided in order to do his  
11 accounting engagement.

12                  THE COURT: What do you say?

13                  MR. DRY: Your Honor, it's only relevant if  
14 it's accepted as true, and, therefore, it's hearsay.  
15 And Mr. Wagner is just publishing facts to the jury --

16                  THE COURT: Beyond that, he has already said  
17 there were some things they needed and that they didn't  
18 get.

19                  MR. WAGNER: Well, I'd like to show that --

20                  THE COURT: Let me tell you something.

21 Horses don't deserve to be beaten when they are dead.  
22 Okay? Objection overruled.

23                  You can put the exhibit in, but no more of  
24 it. He's already said this, and there's no point in  
25 going after it.

1 MR. WAGNER: All right. I'll just touch  
2 on --

3 THE COURT: It's just wasting time. If you  
4 have a point to make, okay, but otherwise, go on with  
5 some other point.

6 (Defendant's Exhibit No. 26 is admitted into  
7 evidence.)

8 BY MR. WAGNER:

9 Q Let me show you Defense Exhibit 27. This is a  
10 status report as of January 30, 2007.

11 MR. WAGNER: I'll try to move through these  
12 quickly, Your Honor.

13 Q Do you recognize this status report?

14 A I do.

15 Q And this was one of the status reports prepared by  
16 your team, correct?

17 A That's correct.

18 MR. WAGNER: I move this into evidence, Your  
19 Honor?

20 MR. DRY: No objection, Your Honor.

21 THE COURT: It's admitted.

22 (Defendant's Exhibit No. 27 is admitted into  
23 evidence.)

24 Q If you look to the very end of that first page, it  
25 indicates that PENTA has requested but not yet received

1 up to 77 monthly bank statements required to complete  
2 the above described analysis; is that true?

3 A That's correct.

4 Q Now move to page 2, please. Go to the bottom of  
5 page 2, the last full paragraph there. In the middle  
6 of the page, it indicates that the records at SOS,  
7 however, were in disarray and were not well  
8 organization; is that correct?

9 A That's correct.

10 Q Thank you. Move on to Defense Exhibit 28. Let me  
11 hand you Defense Exhibit 28, an e-mail from you to  
12 Susan Roski and Matthew Smith. This is an e-mail you  
13 sent on March 2, 2007; is that correct?

14 A I forwarded this e-mail.

15 Q You forwarded an e-mail that you had sent to  
16 Bradley Turner; is that right?

17 A That's correct.

18 MR. WAGNER: I would offer Defense Exhibit 28  
19 into evidence, Your Honor.

20 THE COURT: Any objection?

21 MR. DRY: No.

22 THE COURT: All right. It's admitted.

23 (Defendant's Exhibit No. 28 is admitted into  
24 evidence.)

25 Q If you look to the bottom, the e-mail that was

1 from you to Bradley Turner, it states that the  
2 following table represents SOS files that we were  
3 unable to locate in Richmond and Hector does not have  
4 in Boston.

5 So in March 1 you're still having problems  
6 locating files and statements, correct?

7 A That's correct.

8 THE COURT: Is your point trying to say that  
9 they didn't get all the bank statements?

10 MR. WAGNER: That's part of it, Judge.

11 THE COURT: Well, ask this question: Try  
12 this one on. At the time you finished, how many of the  
13 missing bank statements had you located and how many  
14 were missing in action? And he can either state it as  
15 a percentage or a quantity. And then you have gone  
16 through the whole thing in one question.

17 MR. WAGNER: Very well.

18 THE COURT: Without a bunch of documents.  
19 It's easier for the jury to listen and retain all that  
20 stuff if they hear it directly instead of fighting  
21 through a document.

22 All right. Let's go. Try it and see if you  
23 want to try that one.

24 MR. WAGNER: That's fine, Your Honor.

25 BY MR. WAGNER:

1 Q How many at the end of your engagement in  
2 April 2007, how many of these bank records, bank  
3 statements, were you missing, if you know?

4 A I don't recall.

5 Q Isn't it true there were unreconciled IXG bank  
6 transactions that you noted?

7 A That's correct.

8 Q Let me show you Defense Exhibit 29.

9 THE COURT: Was 28 admitted?

10 THE CLERK: Yes.

11 BY MR. WAGNER:

12 Q That's an e-mail from you to Shirley McCabe?

13 A Yes.

14 Q It indicates a listing of unreconciled IXG bank  
15 transactions?

16 A That's correct.

17 MR. WAGNER: I would offer Exhibit 29 into  
18 evidence, Your Honor.

19 THE COURT: Any objection?

20 MR. DRY: No, Your Honor.

21 THE COURT: All right. It's admitted.

22 (Defendant's Exhibit No. 29 is admitted into  
23 evidence.)

24 MR. WAGNER: I'm coming to the end here,  
25 Judge.

1 BY MR. WAGNER:

2 Q Now, you did a draft profit and loss statement, is  
3 that correct?

4 A That is correct.

5 Q And that was for 2006?

6 A Yes.

7 THE COURT: For whom?

8 MR. WAGNER: For 1031 Tax Group.

9 Q This is Defendant's Exhibit 30. That's a copy of  
10 the profit and loss statement for 2006 and the  
11 forwarding e-mail; is that correct?

12 A Yes.

13 Q If you turn to the second page --

14 MR. WAGNER: We move this into evidence at  
15 this time, Your Honor.

16 THE COURT: Any objection?

17 MR. DRY: One moment, Your Honor. No  
18 objection, Your Honor.

19 THE COURT: All right. It's admitted. What  
20 is it? 29? 30?

21 THE CLERK: 30, Your Honor.

22 (Defendant's Exhibit No. 30 is admitted into  
23 evidence.)

24 BY MR. WAGNER:

25 Q If you'd turn to page 1 of 3 under statement of

1 limitation of information provided. And the second  
2 line down, "This information has not been subjected to  
3 an examination in accordance with  
4 generally-accepted" --

5 THE CLERK: Are we still talking about 30?

6 MR. WAGNER: Yes.

7 Q "This information has not been subjected to an  
8 examination in accordance with generally-accepted  
9 auditing or attestation standards." What does that  
10 mean?

11 A That means it's not in accordance with  
12 generally-accepted accounting principles. It's not --  
13 it was not an accrual basis or cash basis accounting.  
14 It was using the best information we could compile.

15 Q And it says, "We do not express an opinion or any  
16 form of assurance on this profit and loss statement,"  
17 correct?

18 A Yes, that's standard language.

19 Q Now, as of March 9, you're still having problems  
20 getting accounting records, still having problems  
21 getting bank statements, correct?

22 A I don't recall.

23 Q Let me show you a status report of March 9, 2007.  
24 This is a status report prepared by your group,  
25 March 9, 2007?

1 A That's correct.

2 MR. WAGNER: I move this into evidence, Your  
3 Honor.

4 THE COURT: Any objection?

5 MR. DRY: One moment Your Honor.

6 MR. WAGNER: Defendant's Exhibit 31.

7 MR. DRY: No objections, Your Honor.

8 THE COURT: It's admitted.

9 (Defendant's Exhibit No. 31 is admitted into  
10 evidence.)

11 Q In the middle of the page, there's a reference,  
12 "We cannot complete this project until obtaining  
13 resolution of the following two items"; is that right?

14 A That's what it says.

15 Q This was prepared by your team, right?

16 A That's correct.

17 Q Would you read those two items or just explain to  
18 the jury in your own words what those two items were?

19 A We had prepared a list of transactions where we  
20 could not trace where the funds were coming from or  
21 going to. We were still in the process of reconciling  
22 or finding where these transactions went, but had not.  
23 At this point we were asking the company for more help  
24 in tracing these transactions as they would have a more  
25 intimate knowledge of the transactions. That was the

1 first bullet point. Let me read the second.

2 The second was we were going back and forth with  
3 counsel as to whether once we quantified how much funds  
4 had left the qualified intermediaries, if the funds  
5 were to be classified as a line of credit or specific  
6 notes. And I think the answer that we got back from  
7 counsel is that it should be a type of revolver or line  
8 of credit facility.

9 MR. WAGNER: Thank you.

10 Q We can move on to the final exhibit. An E-mail of  
11 March 26, engagement observations that were sent from  
12 Ms. Roski, a copy to you. You can see the first page  
13 is an e-mail. I believe this is Defense Exhibit 32.  
14 This exhibit has engagement observations attached to  
15 it. Is this something that your team prepared?

16 A That's correct. I am not sure if this was the  
17 final version, though.

18 Q And you see there are some handwritten notes on  
19 that second page. Do you know who made those notes?

20 A I do not.

21 Q On the third page, there are also some handwritten  
22 notes. Do you know who made those?

23 A I do not.

24 Q But you are familiar with this particular exhibit?

25 A I'm familiar with the final memorandum that was

1 e-mailed to counsel.

2 MR. WAGNER: And at this time, with the  
3 exception of those handwritten notes which we will try  
4 to redact, I move in Defense Exhibit 32.

5 THE COURT: I am unclear whether this is the  
6 final or it is not the final. Do you know?

7 THE WITNESS: I do not know, Your Honor.

8 THE COURT: All right.

9 BY MR. WAGNER:

10 Q Was the final prepared by March 26, 2007?

11 A I don't recall.

12 THE COURT: Any objection to the proffer of  
13 the exhibit as it is with the redaction of the  
14 handwritten notes?

15 MR. DRY: Can I have just one second to look  
16 through this, Your Honor. It's kind of dense.

17 THE COURT: Why don't you look at it over  
18 lunch hour and we'll decide if it gets admitted then.  
19 You're finished with your examination?

20 MR. WAGNER: I'm pretty close.

21 THE COURT: I thought you said it was the  
22 final.

23 MR. WAGNER: It's the final exhibit. I have  
24 a few more questions.

25 THE COURT: Oh, all right. Any questions?

1 MR. WAGNER: I'm sorry?

2 THE COURT: I told him to look at it over  
3 lunch.

4 MR. WAGNER: I'm sorry, Your Honor.

5 THE COURT: I want you to go on and finish  
6 your examination.

7 BY MR. WAGNER:

8 Q Based on your review of these documents, based on  
9 your recollection of the bank statements that were  
10 missing, is it still your position that your figures  
11 are reliable?

12 A Yes.

13 MR. WAGNER: That's all I have, Judge.

14 MR. DRY: Very briefly, Your Honor.

15

16 REDIRECT EXAMINATION

17 BY MR. DRY:

18 Q Can you explain to the members of the jury why  
19 it's your position that your figures were reliable even  
20 though they were missing bank statements?

21 A In 2006, we traced this dollar-for-dollar, this  
22 \$58.9 million, leaving the QIs and going to these  
23 various entities.

24 Q And the missing bank statements, whose bank  
25 statements were those? Were those the companies' bank

1 statements or were they typically -- was it IPoFA's?

2 THE COURT: Which bank statements? The

3 missing ones or the ones he had or what?

4 Q The missing bank statements, describe what type of  
5 statements were missing.

6 A The majority of the missing bank statements were  
7 individual money market accounts or accounts for  
8 segregated exchange clients.

9 Q So as far as the money, the movement of money, did  
10 you have the bank statements that would have been  
11 necessary for you to come up with this number of  
12 \$58,984,448 and believe that it's reliable?

13 A That's correct. We had not seen any examples of  
14 funds being transferred to or from these individual  
15 money market accounts that were missing.

16 MR. DRY: Ms. Bishop, could you do me a huge  
17 favor? Defense Exhibit 30, could you bring that up on  
18 the elmo, and going to the fifth page of that exhibit,  
19 please.

20 I'm sorry, Mr. Neal.

21 THE CLERK: That's all right. I'm switching  
22 here.

23 MS. BISHOP: Which page?

24 MR. DRY: It's the P&L that Mr. Wagner talked  
25 about.

1                   THE COURT: Which page?

2                   MR. DRY: It's Exhibit 1. It's the 5th page.

3                   MS. BISHOP: Is there a page number on the  
4 bottom?

5                   MR. DRY: The 5th page.

6 BY MR. DRY:

7 Q                Directing your attention to the bottom line, sir,  
8 what does that number reflect in the bottom left-hand  
9 side right next to "net income"?

10 A               For which entity?

11 Q               For AEC.

12 A               For AEC, a plus of \$194,000 for the full year of  
13 2006.

14 Q               How about for IXG?

15 A               A loss of \$1.3 million from August to the end of  
16 the year.

17 Q               How about for NES?

18 A               A loss of \$165,000 for half the year.

19 Q               How about for REES, sir?

20 A               Another loss of \$178,000.

21 Q               How about for SOS?

22 A               A loss of \$1.1 million.

23 Q               But, sir, when you get to the 1031 Tax Group, it  
24 has a net income figure of what?

25 A               \$3.7 million.

1 Q What was that figure based on?

2 A That figure was based on if the funds were  
3 invested that were sent to IPofA or the qualified  
4 intermediaries were invested into 90-day T bills for  
5 the year.

6 Q If they had been invested that way?

7 A That's correct. That is a calculated number.

8 Q Did the 1031 Tax Group actually earn \$3.7 million?

9 A It did not.

10 MR. DRY: Nothing further, Your Honor.

11 THE COURT: Have you had an opportunity to  
12 deal with 32?

13 MR. DRY: I have. No objection from the  
14 United States.

15 THE COURT: It's admitted.

16 (Defendant's Exhibit No. 32 is admitted into  
17 evidence.)

18 THE COURT: Can he be excused?

19 MR. WAGNER: Yes, Your Honor.

20 MR. DRY: Yes, Your Honor.

21 THE COURT: Mr. Massell, you're excused and  
22 free of your subpoena. You may go about your business.  
23 Thank you for giving us your evidence.

24 THE WITNESS: Thank you, Your Honor.

25 (The witness was excused from the witness

1 stand.)

2 \* \* \* \*

3

4 I, Diane J. Daffron, certify that the  
5 foregoing is a true and accurate transcription of my  
6 stenographic notes.

7

8 /S/ Diane J. Daffron 3/23/09  
9 DIANE J. DAFFRON, RPR, CCR DATE

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